SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 374

ROSIE LEE JACKSON, ET AL.,
Petitioners,

vs.

UNITED GAS PUBLIC SERVICE COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA AND BRIEF IN SUPPORT THEREOF.

AUBREY M. PYBURN,
Counsel for Petitioners.

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MAY IT PLEASE THE COURT:

Your petitioners, Rosie Lee Jackson, Lela Dimmer, Lucindia Gipson, and W. B. Massey, respectfully petition this Honorable Court to grant a writ of certiorari to the Supreme Court of the State of Louisiana, and to remove therefrom to this Honorable Court for review, the record of the case therein lately pending entitled Rosie Lee Jackson, et al., *v.* United Gas Public Service Company, et al., being case No. 35,461 on the docket of that court. The case has not yet been officially reported.

Summary and Short Statement of the Matter Involved.

This suit is a sequel to the case entitled *Succession of Tyson, et al.,* 186 La. 516, 172 So. 772. In that case the First District Court of Louisiana, by its judgment (R. 17) decreed four of the original plaintiffs herein, Lucindia Gipson, Lela Dimmer, Rosie Lee Jackson, and Gus Gipson, and Interdict, to be irregular heirs of Louisa Tyson Gibson, and as such the owners, by inheritance, of an undivided one fourth interest in her irregular succession, and of a similar interest in the irregular succession of her predeceased husband, Richard Gibson, in the proportion of .025 to Lucindia, and .075 each to Lela, Rosie Lee and Gus, and sent them into possession thereof. Its judgment also recognized numerous other descendants of Louisa Tyson Gibson as her irregular heirs, and put them in possession of their respective portions of the two irregular successions.

In that case the Supreme Court of Louisiana, on appeal affirmed the judgment of the District Court, restated the law that the doctrine *"le mort saisit le vif"* has no application to irregular successions; and that irregular heirs merely inherit a right of action to have themselves recognized as such and be put in possession of the irregular successions by a judgment of the court; declined to adjudicate the title therein asserted, saying that irregular heirs have no standing in a petitory action until they have been recognized as such and put in possession by judgment; and said (R. 115):

> "The trial judge decided, and we agree with him, that 'the ends of justice demand that the determination of title to specific property be left to the parties in the light of this decision, or to further litigation where all other interwoven claims may be properly adjudicated'."

That judgment became final on February 1, 1937.

The present suit was instituted on October 23, 1937, by

the plaintiffs to recover that undivided one fourth interest in 169½ acres of the land which had formerly comprised a part of the two irregular successions, or in the alternative, to recover the difference between that one-fourth interest and whatever the court should hold had been conveyed to the defendants herein by the two deeds which are attacked in this suit, if it finds that either or both of the two deeds are valid and binding upon plaintiffs, and a like interest in the oil, gas and minerals produced and removed from the property by the defendants, less a like proportion of the cost of drilling, equipping, and operating the wells from which it was produced, and for an accounting.

The two deeds which are attacked herein were intended by the parties who made them to convey the undivided one-fifth interest which, when the deeds were made in 1919, the parties to the deeds erroneously thought had been inherited by Gus Gipson, Sr., deceased, from his parents, Richard Gibson and Louisa Gibson, and had transmitted at his death in 1908 to his four children, Otis, Lela, Rosie Lee, and Gus. One of the deeds (R. 23) was signed by the two children, Otis and Lela, who were then majors, and by their mother, Lucindia Gibson, to N. S. Spearman and W. R. Spearman, on July 8, 1919, and although the description is slightly ambiguous, it was clearly designed to convey the one-tenth interest which they then believed the two majors to own. The other deed which is attacked (R. 24) was signed by Lucindia Gipson, in her official capacity as tutrix for her two minor children, Rosie Lee (therein called Rosetta) and Gus, to the same two Spearmans on August 6, 1919, conveying the one-tenth interest which the parties to the deed then believed the two minors to own. The latter deed was made by the tutrix to effect a partition as a result of her application to the court (R. 25) for authority to make the sale for this purpose because their co-owners were unwilling to hold the property in indivision with the minors

any longer, and after a family meeting convoked for the purpose of deliberating with reference thereto had recommended the same (R. 28), and after the court had approved and homologated the recommendations of the family meeting and authorized her to make the sale for that purpose (R. 30).

Plaintiffs asserted in this suit that both deeds were invalid, first, because the consent of the makers thereof was given in error of fact and of law, and, second, that the deed made by the tutrix was invalid because approval of the family meeting and of the court was obtained under erroneous statements of the facts, and that under the true facts established in the *Succession of Tyson* case there was no authority in law for the sale, and that it was impossible for a valid partition to be made by and between them because they did not own the property at the time (R. 12). Other reasons were assigned but have since been eliminated and are not pertinent here.

There were seven defendants, United Gas Public Service Company, Union Producing Company, N. S. Spearman, W. R. Spearman, Southland Royalty Company, North Central Texas Oil Company, Incorporated, and Wright Brothers Company. Wright Brothers Company did not file any pleadings, and the case was put at issue as to them by default. Each of the other defendants filed an exception of no cause or right of action (R. 30), a plea of estoppel (R. 31) and other pleas which are not pertinent to this proceeding by reason of having no bearing on the questions herein presented, after which they filed answers (R. 33, 133).

The trial resulted in a judgment in the District Court (R. 43) sustaining the exception of no cause or right of action as to the "main demand", and overruling it as to the alternative demands; it also overruled the pleas of estoppel, and other special pleas, and recognized plaintiffs

as the owners of an undivided one twentieth interest, being the difference between the 1/4 inherited and 1/5 sold by the two deeds, and ordered the defendants, Union Producing Company and United Gas Public Service Company, to account for their operations as lessees of the property, and to pay over to plaintiffs 1/20 of the value of the oil, gas and minerals produced, reserving to them the right to recover the costs of drilling, equipping and operating the wells.

Appeals to the Supreme Court of Louisiana were taken by the plaintiffs from that part of the judgment which went against them (R. 45); by the defendants, N. S. Spearman and W. R. Spearman and Union Producing Company (R. 47), and by the United Gas Public Service Company (R. 48) from that part of the judgment which went against them. The three other defendants, Southland Royalty Company, North Central Texas Oil Company, Inc., and Wright Brothers Company, did not appeal, and did not answer the appeal which plaintiffs had taken.

On original hearing on that appeal the Supreme Court of Louisiana affirmed the judgment of the District Court (R. 51).

In sustaining the exception of no cause or right of action as to the "main demand", the Supreme Court of Louisiana took the view that the "main demand" in this suit was identical with the demand set up in the suit of *Dimmer, et al.*, v. *Spearman, et al.*, 178 So. 764, in which these plaintiffs appeared as plaintiffs and these defendants appeared as defendants and that, as the exception of no cause or right of action was good in that case, it should be sustained in this suit in so far as plaintiffs' "main demand" is concerned.

That suit was instituted by the plaintiffs while the *Succession of Tyson* case was pending, and before the plaintiffs had acquired the right to prosecute a petitory action for

the recovery of the property. It was not a petitory action and the sole ground of attack was that the two deeds had been executed by the makers thereof in error of fact and error of law (R. 115). It was brought under Article 1819, *et seq.*, of the Revised Civil Code of Louisiana which provides that consent given in error is no consent, and vitiates the contract.

It was decided, not by the line of judisprudence interpreting those articles, as plaintiffs had intended that it should be, but by Article 2452 of the Revised Civil Code of Louisiana which relates to contracts by persons capable of contracting and provides that the sale of a thing belonging to another person is null. The court held that under the jurisprudence interpreting Article 2452 the error complained of did not authorize a suit by the vendor to annul the sale as long as the vendee was satisfied (R. 121).

Nothing was said in the petition in that case (R. 115), nor in the opinion in that case (R. 121) about whether the tutrix' deed was void because there was no law authorizing her to make the sale to effect a partition at a time when her minor wards did not own the property, and when she did not have custody of the property and could not deliver it. Her legal capacity was not at issue there.

That case is therefore not decisive of the question of whether or not the tutrix had authority in law to make this sale to effect a partition of property which was not susceptible to a partition by her at the time.

The present case is the first and only petitory action which the plaintiffs have instituted to recover this interest since acquiring the capacity to bring such suit under the Succession of Tyson decision, Supra. The law requires the plaintiffs to assert every cause or right by which they think they can recover the property sued for in it, or be forever barred from asserting those rights and causes by the law of *res judicata*. (Revised Civil Code, Article 2286, *McNeely* v.

Hyde, 46 La. Ann. 1083, 15 So. 167). Therefore, the plaintiffs also asserted the same cause and right of action in the present suit, but they did not stop there, and if the reasons assigned in the *Dimmer* v. *Spearman* case for sustaining the exception of no cause or right of action are a bar to anything in the present suit, they could only operate as a bar to our claim that the consent of the tutrix to the sale was void because given in error, which is an entirely different thing from the total lack of authority in law to do the act complained of. This lack of authority strikes at the very roots of the proposition, and is a vital question because it would vitiate the act whether the tutrix acted in error or not.

Illustrating this point the Supreme Court of Louisiana, in 1939, said in *Parker et al.* v. *Ohio Oil Company*, 191 La. 896, 186 So. 604:

> "Tutorships are created by law. A tutor has no authority, no rights, no duties except those which are conferred and imposed by the law."

The sale by the tutrix was made under the authority of Section 2667 of the Revised Statutes of Louisiana adopted in 1870, as amended and reenacted by Act 245 of 1918, which was then in effect, the pertinent parts of which read as follows:

> "Section 1. When two or more persons, some or all of whom are minors or persons interdicted, hold property in common and it is the wish of a co-owner or co-owners, or of a minor or minors, or of an interdict or interdicts represented by his, her or their tutor or tutrix, or curator or curatrix on the advice of a family meeting duly held and convened according to law to represent said minor or minors, or interdict or interdicts to effect a partition of the property held in common, the whole of said property may be sold at private sale for its appraised value, said appraisement to be made and the terms of said sale to be fixed by a family meeting duly convened for that purpose on behalf of

the minor or minors, interdict or interdicts, as the case may be, * * *"

That statute is not an authority for such a sale until the property is actually reduced to the ownership and possession of the minor, and is an exception to the general rule that a tutrix can only sell the immovables of the minor at public auction for purposes laid down in Article 339 of the Revised Civil Code, which the Supreme Court of Louisiana has held has reference only to property which the minor actually owns at the time the tutor applies for authority, and at the time the family meeting to advise with reference thereto is convened. (*Williams* v. *Chotard,* 11 La. Ann. 247; *Spence & Goldstein* v. *Clay,* 169 La. 1030, 126 So. 516).

Furthermore, actual delivery is necessary to complete a sale, as well as a partition and, as this Court had occasion to say in *Reuben Anderson et al.,* v. *Michael Bock,* 15 Howard 333, 14 L. Ed. 714, 716:

"* * * A vendor cannot transfer a title, or a possession which is not vested in him. * * *"

Substantially the same ruling was made by the Supreme Court of Louisiana in *Emerson* v. *Fox,* 3 La. 178, 183; *Ellis* v. *Prevold,* 19 La. 251; *Platt* v. *Maples,* 19 La. Ann. 459.

Therefore, when it became apparent from the opinion on the original hearing of the appeal (R. 51) that the Supreme Court of Louisiana had not passed on, or taken notice of, the latter cause of action, and had therefore not tested the legal power of the tutrix, nor the validity of her deed, by the law which created her office and defined her powers, plaintiffs filed a motion in that Court calling attention to this fact and prayed that Court to grant them a rehearing, and to first ascertain and decide from an examination of the source of her authority, whether or not she had authority in law, in the light of the Succession of Tyson decision, to make this deed and to bind her minor wards thereby, before it reached

the point of deciding what effects, if any, should flow from that deed (R. 24), and the Court granted that rehearing. However, that Court did not thereafter mention or decide the issue thus laid before it, but in its opinion on rehearing stated that:

> "Plaintiffs applied for a rehearing, alleging that they were entitled to an undivided one-fourth interest in the land on the grounds that as they were irregular heirs, they had only the right to claim that they inherited a part of the property in question; that, as they were not legal heirs, they did not obtain the seizin of the property at the time of the death of their father and did not acquire their interest therein until 1937, when they were recognized as irregular heirs in the Succession of Tyson, supra; that therefore, the act of sale by Otis Gibson and Lela Gibson Dimmer, the two major children of Gus Gibson (Gipson), Sr., in July, 1919, to the defendants, and the act of sale by Rosie Lee and Gus Gipson, Jr., the two minor children of Gus Gibson, Sr., through their tutrix, in August, 1919, to the defendants, for the purpose of effecting a partition of the property in question, are null and void, because the vendors therein did not then have seizin of or title to the property sold."

That this was a substantial misconception of the object is patent upon the face of the papers and can be readily seen by the Judgment (R. 43) which shows that plaintiffs had been awarded a 1/20, and that the accounting prayed for had been ordered; by the decree of the Supreme Court of Louisiana (R. 51) affirming it on the original hearing, and by plaintiffs' motion for rehearing (R. 61) in which plaintiffs conceded the correctness of the Court's ruling by which the plaintiffs lost the 1/10 interest covered by the deed which had been made by the two major heirs. There was nothing else being claimed by the plaintiffs but the 1/10 covered by the Tutrix' deed.

That this misconception of the point had a substantial and prejudicial effect upon the final disposition of the case by

that Court is apparent from the opinion on rehearing (R. 68) in which the Court continued to apply the law relating to legal successions and legal heirs instead of the law relating to irregular successions and irregular heirs, by treating the acts of the tutrix as though there was no question in the case about her authority to act in the manner complained of for the minors, and as though she had been dealing in 1919 with property which the minors actually owned and which was therefore in her official custody, rather than with property which they might at some time acquire in the event that they, or she for them, successfully exercised the right of action which then belonged to them as irregular heirs, and which was in her official custody.

The defendants-appellants also filed a motion for a rehearing (R. 65) which was granted. When the case was called in that Court for argument on this rehearing, the defendants-appellants filed a plea of judicial estoppel and *res adjudicata* (R. 66), which was objected to by the plaintiffs as coming too late.

That plea of judicial estoppel brought a new defense into the case by alleging that the tutrix had alleged, in her petition for authority to sell in 1919, that the minors and the Spearmans owned the property in indivision, and that the defendants had relied on those judicial admissions and on the judgment rendered thereon, when they purchased the minors' interest from their tutrix and that the plaintiffs were estopped thereby from now claiming any interest in the property.

These allegations clearly required proof and were subject to rebuttal but no opportunity was given plaintiffs to bring forward their rebuttal evidence, and no consideration was paid to such evidence as was already in the record which would refute that charge. By this plea of judicial estoppel the said defendants-appellants sought to deprive the two plaintiffs, Rosie Lee Gipson Jackson and Gus Gipson, of the

difference between the 1/10 interest which their tutrix had sold by the deed in 1919, and the 15% interest which the said two plaintiffs inherited in the Succession of Tyson, decision, supra, without any sale thereof ever having been made either by them or their former tutrix, and without any writing upon which to base a title to that difference, which amounted to 5% of the property and on this rehearing this plea of estoppel was sustained by the Supreme Court of Louisiana and the 1/20 interest formerly awarded to said plaintiffs was taken from them on the strength of that plea.

This was done despite the fact that under the law in Louisiana, (Revised Civil Code, Article 2275 and Article 2440) all title to real-estate must be in writing and that parol evidence is not admissible to establish such title.

This ruling was made by that court without an examination into the source of the authority of the tutrix for the purpose of determining whether or not she acted within the scope of her official authority, and it is the contention of petitioners that under the law relating to irregular successions she was wholly without authority to make such judicial admissions for the minors, or to bind them thereby, because her official authority was limited by statute to the administration of the property which the minors actually owned. An administration of the right of action which they then owned neither required nor permitted the filing of such a petition as that in which the judicial confession is said to have been included.

To further illustrate that the Supreme Court of Louisiana has discriminated against these petitioners in its administration of the law relating to irregular heirs and irregular successions, petitioners point to the case of *Tyson, et al.* v. *Spearman, et al.*, 190 La. 871, 183 So. 201, which was referred to by the Supreme Court of Louisiana in its original opinion, as well as in its opinion on rehearing in the present case. In that case a number of the irregular heirs who were

recognized as such in this same succession of *Tyson* case, *supra,* sued for and recovered their respective interests in the property which is involved in the present suit, and that case was decided in the light of the Succession of Tyson decision, by the law relating to irregular heirs.

In its original opinion in the present case, the Supreme Court of Louisiana overruled the plea of estoppel filed by the defendants, for the same reasons it had given in the said *Tyson* v. *Spearman* case for overruling the plea of estoppel in that case by these same defendants. But in its opinion on rehearing in the present case, the Supreme Court of Louisiana made the following statement:

> "In our original opinion affirming the judgment of the District Court, we overruled the plea of estoppel citing Tyson, et al. *v.* Spearman, et al., 190 La. 871, 183 So. 201. In that case, the plea of estoppel was based on the silence and inaction of the Tyson heirs in asserting their rights. We held that they were not estopped to assert their interest as the defendants had not in any way acted upon their inaction and, consequently, mere silence would not work an estoppel. The plea of estoppel here is predicated on the solemn acts and representations of the plaintiffs made in judicial proceedings and authentic acts, upon which the defendants relied in purchasing the property and parting with a valuable consideration therefor. There is, therefore, no similarity between the two cases in that respect and the legal distinction between them is well recognized. Parker *v.* Ohio Oil Co., 191 La. 909, 186 So. 604; 10 R. C. L., Sec. 21, 692; 27 R. C. L. 360; 19 Am. J. 742 and 21 C. J. 1131."

The minors, Rosie Lee and Gus Gipson, in the present case, did not personally make any representations or sign any judicial proceedings or authentic acts, and unless they are lawfully bound by the acts of their tutrix, which were nothing more than the totally unauthorized acts of an agent,

they are on exactly the same footing, and entitled to exactly the same protection that was given to the plaintiffs in the said *Tyson* v. *Spearman* case because they are co-irregular heirs with the plaintiffs in that case.

In its opinion on rehearing that court gave the following additional reasons as a support for its judgment in sustaining the plea of estoppel herein:

> "In the instant case it would be impossible to restore the status quo between the parties as the defendants over a great many years, after the minors had reached their majority and without any protest from them have developed the property through gas and oil well operations to where it is very valuable and the plaintiffs had not contributed anything in that respect."

The court evidently overlooked the provision in the judgment of the District Court in the present case which provides that the defendants, United Gas Public Service Company and Union Producing Company shall be entitled to recover out of the proceeds of each oil or gas well now on said property 1/20 of the actual and true cost of drilling, equipping and operating said well, which conclusively shows that the minors are not trying to enrich themselves at the expense of the defendants (R. 43).

Illustrating that this ruling is also a discrimination against these plaintiffs and deprives them of the equal protection of the laws, we point out that in the said *Tyson* v. *Spearman* case, *supra*, the Supreme Court of Louisiana said on page 890 of Louisiana Reports No. 190:

> "It therefore cannot be reasonably argued that if their rights were exercised within the time prescribed by law that they are estopped by failure to assert their rights at some earlier time. One cannot be estopped for failure to prosecute a cause of action by a period less than by which the action is prescribed. Davis *v.* Young, 36 La. Ann. 374; Vandry *v.* New Orleans Cot-

ton Exchange, 2 McGloin 154; Reed *v.* Eureka Homestead Society, La. App. 143, So. 891; First National Bank *v,* Guynes, 11 La. App. 323, 123 So. 461."

On rehearing the Supreme Court of Louisiana also supported its judgment sustaining the plea of estoppel by saying:

> "* * * They did not transfer their right to accept the successions of Richard and Louisa Gibson as irregular heirs, but transferred the property by warranty deeds, which, in effect, amounted to a warranty that they were legal heirs. * * * It is clear that the plaintiffs, in accepting the succession of Otis Gibson, their deceased brother and the son of Gus Gipson, Sr., are bound by his warranties and representations and are estopped to set up any alleged future acquired title as against the interest which Otis Gibson warranted in his sale to the defendants, as the plaintiffs inherited no greater rights from Otis that he had. * * *"

It is the well settled and heretofore uniformly enforced law in Louisiana that a minor is not bound by the warranties of his ancestor in title to any greater extent than the property received by him from his ancestor. While the minors, Rosie Lee and Gus Gibson were irregular heirs of Louisa, they were legal heirs of Otis. In this respect both articles 352 and 977 of the Revised Civil Code of Louisiana contain the following words regarding legal heirs:

> "It shall not be necessary for minor heirs to make any formal acceptance of a succession that may fall to them, but such acceptance shall be considered as made for them with benefit of inventory by operation of law, and shall in all respects have the force and effect of a formal acceptance."

That the expression "with benefit of inventory" means that the minors cannot be condemned beyond the amount of property inherited is clearly shown by the decisions of the

Supreme Court of Louisiana in *Fontelieu* v. *Fontelieu*, 116 La., 866, 41 So. 120; Succession of Hebert, 27 La. Ann. 300.

The Succession of *Tyson* case, *supra*, holds conclusively that Otis Gibson did not own any interest in the property of the irregular successions, but merely owned a right of action and therefore it follows that he transferred no interest in the property by his deed, since, as the Supreme Court of Louisiana said, he did not sell his right of action.

Thereafter plaintiffs herein moved the Supreme Court of Louisiana to amend its judgment so as to reserve to them the right to apply for a second rehearing relating to the 1/10 covered in the tutrix deed (R. 77), and at the same time filed an application for a rehearing on the question of their right to the 1/20 interest (R. 80), which, for the first time, had been decided adversely to them. Thereafter, on May 27, 1940, while those two motions were still pending before that Court, plaintiffs filed another motion for relief in that Court (R. 85). In each of these motions plaintiffs set out that the Court had by said opinion deprived plaintiffs of the equal protection of the laws, and of due process of law, in violation of their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States and prayed the court to reopen the case for the purpose of rectifying this error, but that court denied plaintiffs a rehearing (R. 91) and did not pass on either of the other motions which had been filed by plaintiffs. Petitioners then filed a motion in the court (R. 91) giving notice of their intention to apply to the Supreme Court of the United States for a writ of certiorari, and served a copy of the same upon the counsel for the various defendants, and prayed for a stay of mandate. On May 29, 1940, Honorable Charles A. O'Niell, Chief Justice of that court, signed an order temporarily staying the mandate (R. 92).

Basis Upon Which it is Contended This Court Has Jurisdiction to Review the Judgment in Question.

The manner in which petitioners contend the Supreme Court of Louisiana denied them equal protection of the laws and deprived them of their property without due process of law, is fully set forth in the foregoing summary and short statement of the matter involved, and for the sake of brevity, will not be repeated here.

Petitioners recognize that this Court ordinarily will not consider contentions first made in a petition to the State Court for a rehearing but contend that this case falls within the exception to that rule which has been recognized by this Court in the following cases:

Great Northern Ry. Co. v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 53 S. C. R. 145, in which the court said in discussing the general rule that a constitutional question is urged too late, if put forward for the first time upon a petition for rehearing:

> "The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided, * * * nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right."

State ex rel. Missouri Insurance Co. v. *Gehner, Assessor*, 74 L. Ed. 870, 281 U. S. 313, 331, in which the court said:

> "It is well settled that this Court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition to the state court for a rehearing where the petition is denied without more. Citizens Nat. Bank *v.* Durr, 257 U. S. 99, 106, 66 L. Ed. 149-152; 42 S. C. R. 15. But here the Company, at the first opportunity invoked the protection of

the Federal Constitution and statute. It could not earlier have assailed the Section as violative of the Constitution and laws of the United States."

Substantially the same ruling was made in this Court in *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 74 L. Ed. 1107, 281 U. S. 673-682.

Saunders v. *Shaw et al.,* 244 U. S. 317; 37 S. C. R. 638; 61 L. Ed. 1163, in which the court said:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by Legislation. Home Teleph. & Teleg. Co. *v.* Los Angeles, 227 U. S. 278, 57 L. E. 510, 33 S. C. R. 312. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the state by his assignment of errors. We do not see what more he could have done."

In the present case the very heart of petitioners case is the allegation that there was no authority in law for the tutrix to make any representations or to file the petition containing the judicial admissions which defendants rely on for estoppal nor to partition the property or to make the

deed for that purpose in view of the fact that her minor wards were irregular heirs, possessed of nothing but a right of action, instead of being legal heirs possessed of the property itself.

The plaintiffs' entire case in so far as it relates to the 15% interest which the Succession of Tyson judgment, *supra,* held Rosie Lee Gipson Jackson and Gus Gipson to have inherited as irregular heirs is built around the proposition which was laid out by the Supreme Court of Louisiana itself, and which is the law, that the rights of irregular heirs, prior to being recognized as such by judgment, and consequently, the rights of their tutors, who are nothing more than agents appointed by the law, differ from the rights of legal heirs and consequently, the rights of their tutors.

Undoubtedly, the plaintiffs have a right, in the face of our charge in our petition that there was no authority in law for her action, to have that question decided first before reaching the question of what effect, if any, should flow from her act, and that the words "due process of law" embraces not only the right to have the court, and the right to present your case to the court, but the right to have that court decide on the case which you actually present, but that the Supreme Court of Louisiana has, itself, either inadvertently or purposely evaded a decision of this question of her authority and has arbitrarily adjudged the case without reference to that feature.

This Honorable Court said in *Chapman* v. *Crane,* and *Stryker* v. *Crane,* 123 U. S. 540, 31 L. Ed. 235, 8 Sup. Ct. Rep. 211, that:

> "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action thereon. * * *"

Furthermore, in the present case, as we have pointed out, the plea of judicial estoppel which was one of the substantial supports of the court's ruling which deprived us of the 1/20th interest was not filed at any stage of the case until the case was actually called for rehearing in the Supreme Court of Louisiana on appeal, and consequently plaintiffs were not bound to, and had not taken precautions against such a plea, which, even if permitted to be filed could not lawfully be used against them until they had opportunity to bring their evidence, under Article 346 of the Louisiana Code of Practice which has always heretofore consistently been upheld and recognized, and which reads as follows:

> "Exceptions Founded on Law—Time Pleadable.—Peremptory exceptions, found on law, may be pleaded in every stage of the action, previous to the definitive judgment; but they must be pleaded specially, and sufficient time allowed to the adverse party to bring his evidence."

It is contended by petitioners that this Court, under the following decisions of this Court has jurisdiction and authority to review the decision in question on a writ of certiorari.

Zucht v. *King*, 260 U. S. 174; 67 L. Ed. 194; 43 S. C. R. 24, in which this Court said:

> "The bill contains also averments to the effect that, in administering the ordinance, the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. * * * The question does not go to the validity of the ordinance; nor does it go to the validity of the authority of the officials * * * This charge is of an unconstitutional exercise of authority under an ordinance which is valid * * *. Unless a case is

otherwise properly here on writ of error, questions of that character can be reviewed by this Court only on petition for a writ of certiorari."

Yazoo & Miss. R. Co. v. *Clarksdale,* 257 U. S. 10, 66 L. Ed. 104, in which the court said:

> "What is denied here is the regularity of the Marshal's attempted exercise of his conceded authority, and the validity of the resulting title. Hence, the only way of reviewing this cause is by certiorari."

The court then cited *Dana* v. *Dana,* 250 U. S. 220, 63 L. Ed. 4947; 39 S. C. R. 449, *Phila. & R. Coal & I. Co.* v. *Gilbert,* 245, U. S. 162, 62 L. Ed. 221, 38 S. C. R. 58; *Avery* v. *Popper,* 179 U. S. 305, 314, 45 L. Ed. 203-206; 21 S. C. R. 94, as supporting this view.

Questions Presented.

Whether or not the Supreme Court of Louisiana has denied petitioners the equal protection of the laws of Louisiana which require all transfers of immovable property to be in writing, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States by its actions and in the manner set out in the foregoing summary and short statement of the matter involved:

1. By evading a decision of whether or not there was authority in law for the tutrix to make the representations, petition and deed, in 1919, before deciding what effects, if any, should flow therefrom, (a) denied petitioners the equal protection of the laws, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States; (b) deprived petitioners of their property without due process of law, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

2. Denied petitioners the equal protection of the laws and deprived petitioners of their property without due process of law by receiving the plea of judicial estoppel and adjudicating the same at a time when petitioners could not bring forth their evidence to rebut the facts stated in that plea, and without requiring the defendants who asserted those facts in that plea to support their allegations by evidence or testimony taken contradictorily in open court with petitioners, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

3. Denied petitioners the equal protection of the laws and of their property without due process of law by holding that the minors were bound by the warranties of Otis Gibson, deceased, to any greater extent or amount than the property actually received by inheritance from him, by accepting his succession, in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

4. Denied petitioners the equal protection of the laws of estoppel in violation of their rights under the Fourteenth Amendment to the Constitution of the United States.

Reasons Relied On for Allowance of the Writ.

The principal reasons relied on for the allowance of the writ are fully set forth in the summary and short statement of the matter involved, the statement of the basis upon which it is contended this Court has jurisdiction and the questions presented and to avoid repetition will not be repeated under this heading.

It is submitted that this application involves substantial Federal questions and that the decision of such questions is important for the guidance of similar litigants occupying the

class of irregular heirs in the future; that the Supreme Court of the State of Louisiana is the highest court of law and equity in said State; that the judgment appealed from is a final judgment, and that the whole record in so far as it bears on the questions presented is before this Court on this application, and that this application is made within the time prescribed by law and by the rules of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Louisiana, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case, numbered and entitled on its docket No. 35,461, *Rosie Lee Jackson et al.* v. *United Gas Public Service Company et al.*, and that the said decree of the Supreme Court of Louisiana may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

ROSIE LEE JACKSON,
LELA DIMMER,
LUCINDIA GIPSON,
W. B. MASSEY,
Petitioners,
By AUBREY M. PYBURN,
Counsel for Petitioners.

Dated August 21st, 1940.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the court below is not yet officially reported.

A certified copy of the opinion of the court below on original hearing is found in the record herein (R. 51).

A certified copy of the opinion of the court below on rehearing is found in the record herein (R. 68).

II.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked is made in the foregoing application and for the sake of brevity will not be repeated here.

III.

Statement of the Case.

The case is fully stated in the petition to which reference is respectfully made.

IV.

Specification of Errors.

A specification of the errors is fully set forth in the petition to which reference is respectfully made.

V.

Argument.

Bearing in mind that to this Court a summary of the facts will lay bare the legal arguments, we have endeavored to accomplish that end in the statement of the matter involved

in the first part of the foregoing petition for a writ of certiorari.

We earnestly submit that equal protection of the laws and due process of law contemplate not a mere mockery but an actual trial and decision of the issues which litigants are required to present to the courts for adjudication.

This Court has recognized the proposition that a right or immunity set up or claimed under the Constitution of the United States may be denied as well by evading a direct decision thereon as by positive action thereon (*Chapman* v. *Crane et al., and Stryker* v. *Crane,* 123 U. S. 540, 31 L. Ed. 235, 8 Sup. Ct. Rep. 211), and it is easy to perceive that the highest State court in the State of Louisiana to which we could ordinarily take our case, could, as we claim it did in the present case, deny due process of law to a litigant and turn the trial of the case into a sham by evading the decision of the very question upon which the success or failure of plaintiffs' cause hinges.

In the present case, the record, including the opinion of the Supreme Court of Louisiana in the case of *Succession of Tyson et al.* (R. 98), shows that there are two classifications of heirs in Louisiana and that the rights and powers of each class are different until they are put upon the same level by a judgment of the court recognizing the irregular heir as such and putting him in possession of the irregular succession property.

It is petitioners' contention that this law was purposely made by the legislators and that it was intended that it should operate equally upon every person who fell within the respective classifications.

The opinion of the Supreme Court of Louisiana on rehearing in this case, reiterates the reasons given by that Court in *Tyson* v. *Spearman,* 190 La. 871, 183 So. 201, in that case, for overruling the plea of estoppel which the defendants in this case who were also defendants in that case,

had filed in that case that the plaintiffs in that case who are co-irregular heirs with those in the present case had signed nothing and done nothing upon which these same defendants relied and that therefore, the plaintiffs were not estopped and our contention in the present case is that the two minors, Rosie Lee Gipson and Gus Gipson, did nothing and signed nothing in the present case, and that their tutrix was wholly without authority in law to make any representations that would bind them, or to make application for the holding of a family meeting with reference to a sale and was wholly without authority to make the deed or to effect a partition of the property because of the fact that her minor wards were irregular heirs instead of legal heirs.

If this were not true and if it did not have a vital bearing upon this case, the laws which divide heirs into these two classifications and fix their rights and powers with reference to the property, would mean nothing when one of the irregular heirs was a minor.

Petitioners, therefore, submit that a writ of certiorari should be granted herein as prayed for.

Respectfully submitted,

AUBREY M. PYBURN,
Counsel for Petitioners.

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